

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

CLEVELAND REHABILITATION & SPECIAL CARE CENTER, INC.¹

Employer

and

Case No. 8-RC-16032

**HOTEL EMPLOYEES & RESTAURANT EMPLOYEES UNION,
LOCAL NO. 10**

Petitioner

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act (hereafter referred to as the Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

¹ The Employer's name appears as amended at hearing.

² The Employer and the Petitioner filed post-Hearing briefs that have been duly considered.

4. No question affecting commerce exists concerning the representation of certain employees of the employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act, for the following reasons:

The Employer is an Ohio corporation engaged in the operation of a two hundred twenty (220) bed skilled nursing and rehabilitation facility located in Cleveland, Ohio. The facility provides nursing and rehabilitative care to the elderly and chronically ill residents. The Petitioner seeks to represent a unit consisting solely of licensed practical nurses (LPNs) employed at the Employer's facility. The Employer contends that all of the LPNs employed at the facility are charge nurses, and as such, are supervisors within the meaning of Section 2(11) of the Act. Accordingly, the Employer contends that the bargaining unit is inappropriate and the petition should be dismissed. There are approximately thirty (30) individuals in the petitioned-for unit. By joint stipulation at hearing, the Employer and Petitioner agreed to exclude the Minimum Data Set (MDS) nurse, also known as the resident care coordinator, from the unit if an election is directed herein.

The Employer's facility is divided into two towers with four floors for a total of eight floors or "units" as referred to by the Employer. Six units in the facility have thirty one (31) beds and the two units on the first floor of both towers have seventeen (17) beds. Typically, each of the units is staffed by one charge nurse, two to five state tested nurses assistants (STNAs, which are, at times, referred to as nurses' aides), a housekeeper and several resident helpers. Staffing of the units is divided into three eight-hour shifts which maintain the above breakdown with the exception of the housekeeper who primarily works only on the first shift. Typically on a given shift, there are forty (40)

nurses aides, seven to eight charge nurses and approximately five resident helpers working in the facility.

The Employer is owned by an entity called Multi Care Management. In 1993, Multi Care Management purchased Carnegie Care Center and following such acquisition, named the facility Cleveland Rehabilitation and Special Care Center. Prior to the purchase by Multi Care Management, the Petitioner was recognized as the exclusive collective bargaining representative for a bargaining unit which included licensed practical nurses, nurse aides, housekeeping aides, porters, cooks, dietary aides, dishwashers, maintenance and P.A.B.X. Operators employed at Carnegie Care Center. Subsequent to Multi Care Management's acquisition of Carnegie Care Center, Multi Care Management and the Petitioner reached an agreement that excluded LPNs from the bargaining unit. Both the Petitioner and Employer have entered into two successive collective bargaining agreements, including the current collective bargaining agreement effective from January 1, 1999, through December 31, 2001, which specifically excludes LPNs and charge nurses from the unit.

Including the facility at issue in this matter, Multi Care Management operates ten (10) skilled nursing and rehabilitation facilities in Ohio, as well as an additional facility in Las Vegas, Nevada. While some of these facilities have certain classifications of employees who are represented by labor organizations, other facilities do not.

With respect to the instant facility, the supervisory hierarchy for the nursing staff is as follows: the director of nursing (DON) oversees the entire nursing department at the facility; the assistant director of nursing (ADON) reports to the DON and oversees some ancillary departments at the facility, including minimum data set nurse (MDS),

restorative and wound treatment units;³ and the house supervisor, also known in the facility as the nursing supervisor or the RN supervisor, oversees the charge nurses. The DON, ADON and house supervisor maintain offices in the facility. One house supervisor is on duty for each shift at the facility directing services which are performed by charge nurses and aides in each unit.

According to the Employer's written job descriptions which are applied with some degree of uniformity in all of the nursing facilities operated by Multi Care Management, an RN license is a prerequisite for the director of nursing, the assistant director of nursing and the house supervisor position. Based upon the written job descriptions, charge nurses employed at the facility can hold either LPN or RN licenses. The record evidence however establishes that LPNs are only employed as charge nurses and hold no other position at the Employer's facility.⁴

With specific regard to the Employer's written job description and performance/development review for the charge nurse position, the job description states that the charge nurse, "[d]irects and supervises the activities of nursing assistants to ensure compliance with Federal, State, and JCAHO (Joint Commission Accrediting of Hospital Organizations) regulations." Further, the written job evaluation form contains a section of evaluation criteria under the heading "Supervisory Responsibilities" for charge nurses. Under the "Supervisor Responsibilities" evaluation criteria, the Employer

³ At the time of hearing, the assistant director of nursing position was vacant.

⁴ The evidence offered by Sally Bagwell, Director of Human Resources for Multi Care Management reflects that the written job description for the position of MDS Nurse, also referred to as the restorative nurse or resident care coordinator, requires either an RN or LPN license. The Employer's own witnesses, however, presented conflicting evidence as to whether an LPN holds the position of MDS nurse at the facility. Despite Bagwell's testimony that an LPN currently holds the position of MDS nurse at the Employer's facility, William Weisberg, Executive Vice President of Operations for the Employer indicated that LPNs only hold the position of charge

evaluates whether the charge nurse “Directly supervises all nursing assistants and resident helpers on the nursing unit.”; “Carries out supervisory responsibilities in accordance with the facility’s policies and procedures and applicable laws.”; “Completes fair and timely performance appraisals for staff as assigned.”; “Plans, assigns, and directs work of the unit.”; “Maintain[s] order and discipline on unit. Discipline[s] and/or suspend[s] employees as appropriate according to facility policies and procedures.”; and, “Conducts corrective discipline with department staff as necessary according to facility policies and procedure.”

With respect to the above-enumerated supervisory responsibilities in the Employer’s written evaluation form for charge nurses, evidence introduced at the hearing reflects some dissonance between the actual job duties and supervisory responsibilities of charge nurses, and the Employer’s policies and expectations that charge nurses perform such supervisory duties.

At the hearing, Sally Bagwell, Director of Human Resources of Multi Care Management testified on behalf of the Employer with respect to employment relations policies at the Employer’s facility. Additionally, the Employer offered testimony from William Weisberg, Executive Vice President of Operations for Multi Care Management who is familiar with operations at the Employer’s facility. With respect to their overall responsibilities at the Employer’s facility, Weisberg testified that charge nurses are “the directors of the care. They interpret the data as provided in the chart, as provided by the plan of care and they direct the aides to deliver those services.”

nurse at the facility. As noted above, however, the parties stipulated to the exclusion of the MDS nurse from the potential bargaining unit.

With respect to the supervision of work, charge nurses at the facility direct the work of STNAs and resident helpers. A resident helper is a basic entry-level position for an individual who wants to become a nursing assistant. Resident helpers cannot deliver direct hands-on care to residents at the facility. As such, resident helpers distribute trays, make beds, assist in certain feeding activities and develop entertainment activities for the residents. STNAs are trained by nurses to provide direct services to nursing home residents. STNAs engage in bathing, bowel and bladder retraining of residents, as well as daily living, dressing and grooming of residents as directed by the charge nurse.

Within each nursing unit at the facility is a nursing station. The nursing station is the primary work area for the charge nurses but often is used by other medical personnel including dietitians, occupational therapists, doctors, social workers and therapists. Nurse aides do not enjoy access to nursing stations because of sensitive patient information which is kept at the nursing stations.

Each of the nursing units at the facility contain policy and procedural manuals which set forth State, Federal, JCAHO, and Employer guidelines for the delivery of nursing services. One such manual kept at the nursing station at each unit is the flow chart. Flow charts contain collective data on residents of the facility as gathered by the charge nurses and the resident care coordinator. The flow charts contain vital patient information which STNAs have access to in order to work with patients. While STNAs are provided access to residents' flow charts, no STNA access is provided to resident charts. Unlike flow charts, resident chart access is limited to licensed medical personnel including nurses, doctors and social workers.

Another manual kept at the nursing station in each unit is the daily assignment sheet. The daily assignment sheet provides daily written instructions on routine nursing tasks that must be carried out in each unit. These pre-printed daily assignment sheets are completed by the charge nurse assigned to each shift in the nursing unit and include routinized nursing tasks such as bath and shower schedules and cleaning schedules and assignments.

While Bagwell's testimony indicates that the charge nurse is expected to use independent discretion on what tasks need to be done on a particular shift, the testimony of Charge Nurse Kevin Hughley appears to indicate otherwise. According to Hughley, the charge nurse simply directs the STNAs to complete daily, routinized tasks which are usually rotated among the assigned nurses aides and resident helpers. According to Hughley's testimony, the charge nurse assigns various tasks based upon the number of residents in the unit and the nurses' aides assigned to a particular shift. Hughley testified that these tasks are normally rotated among the nursing staff assigned to the unit. In circumstances in which medical emergencies or other abnormal circumstances arise within the unit, Hughley stated the protocol is for the LPN to notify the house supervisor before making calls to a physician. Hughley further testified that the LPNs have no authority to make changes to the resident's plan of care.

The testimony at the hearing reflects some discrepancies between witnesses with regard to the scheduling of STNAs. According to Weisberg, the staffing coordinator assigns nurses aides to a particular shift and unit based upon the input from the charge nurse. Weisberg testified that the staffing coordinator develops a master schedule for STNA assignments and it is the charge nurse's responsibility to review the assignment

schedule, ensure that the unit is adequately staffed and “make accommodations necessary to have adequate staff.” Weisberg testified that where the charge nurse is unhappy with STNA staffing in his or her unit, the charge nurse may request the staffing coordinator to make changes. Further, where a charge nurse finds that a nurses’ aide has failed to report to work for a scheduled shift, the staffing coordinator normally makes arrangements to find replacement nurses aides. Weisberg, however, indicated that on occasion the charge nurses will get on the phone and call in staff. Weisberg testified that charge nurses may ask STNAs to work past the end of their shift or work a split shift without prior supervisory approval in order to ensure that there is adequate staffing in the unit.

In addition, Bagwell testified that the charge nurses can direct employees to work beyond their scheduled shift by using the “Overtime Missed Punch Form.” The “Overtime Missed Punch Form” is used if employees are going to work over their scheduled shift, an employee forgets to use a time clock badge or the employee improperly punches a time card. Accordingly, the charge nurse is required to authorize an employees’ form in order for the nurse aide or resident helper to receive payment.

Charge Nurse Hughley acknowledges that a staffing schedule or daily floor assignment sheet is prepared by a scheduler and some degree of continuity is maintained from week-to-week among the STNAs and resident helpers which are assigned to a particular unit. Hughley, however, is unaware of any independent authority that charge nurses have to call off-duty nursing employees where the unit is short staffed. Where a nurse aide or resident helper assigned to a unit is unable to report to work, the employee must notify the nursing supervisor. In cases in which there is a shortage of STNAs in a particular unit, Hughley testified that the charge nurse on duty notifies the house

supervisor who has authority to transfer an STNA from one floor to another. At minimum, the charge nurse must notify the house supervisor prior to removing an STNA from another unit to work on a short-staffed floor. While the charge nurse has discretion in scheduling breaks and lunch periods for nursing staff in a particular unit, there are only two lunch break periods and two ten (10) minute breaks which are staggered in order to ensure proper staffing for adequate patient care. Further, vacation requests submitted by STNAs and resident helpers must be submitted and approved by the staffing scheduler and the human resources department. Moreover, Hughley testified that charge nurses have no independent authority to grant sick leave requests submitted by nurses aides or resident helpers.

With respect to charge nurses' handling or adjustment of grievances filed by nurse aides and resident helpers, the evidence unambiguously establishes that charge nurses do not handle grievances filed by bargaining unit employees. Rather such grievances are handled by higher-ranking supervisory staff, primarily the RN Supervisor,⁵ the Director of Nursing or human resources personnel.

With respect to the authority of charge nurses to hire prospective candidates, evidence reflects conflicting testimony on the degree to which charge nurses participate in hiring decisions. Bagwell testified that charge nurses have hired employees at the facility. However, her testimony indicated that charge nurses only complete interview evaluation forms when interviewing prospective candidates and that these evaluation forms are taken into account when making hiring decisions. Charge nurses have the

⁵ Hearing evidence was controverted as to whether RN Supervisors are responsible for handling grievances. Bagwell testified that RN shift supervisors are not responsible for handling grievances. However, Weisberg, Kado Massey and Hughley all testified that RN Supervisors are

authority to participate in the first or second interviews for hiring prospective nursing candidates. The Employer has developed two separate interview evaluation forms which are used by charge nurses in the hiring process. These different interview forms provide the Employer feedback on different areas of a candidate's background based upon checklists and a rating of candidates based on certain evaluation criteria. Both interview evaluation forms confer upon the charge nurses the authority to rate candidates and do not request a recommendation as to a hiring decision.⁶ Hughley testified, however, that he has not personally participated in the interviewing of prospective employees nor has he been consulted about whether a particular nurses' aide should be hired or promoted to an LPN position. Hughley testified that based upon his experience at the facility, the DON, ADON and human resources employees make hiring decisions.

The Employer contends that charge nurses participate in certain meetings held for administrative or supervisory employees. Weisberg testified that charge nurses have participated in a legal documentation seminar which was attended by DONs, ADONs, and MDS Nurses, as well as a meeting or meetings with the facility DON to discuss the responsibilities of charge nurses. Weisberg further testified that LPNs attend daily "stand-up" meetings particularly if there is information presented regarding residents. While the record does not indicate with specificity the nature of these meetings, at times patient care issues are discussed. Hughley indicated, however, that he has not attended

responsible for handling and adjusting grievances. Nevertheless, the record evidence indicates that charge nurses are not involved in handling grievances by bargaining unit employees.

⁶ However, one of the complete interview evaluation forms admitted into evidence sets forth a charge nurse's recommendation for hiring a candidate in the comment section of the form. Nevertheless, neither evaluation form requests any recommendation from the interviewer as to whether a candidate should be hired.

“stand up” meetings and that these meetings are usually attended by the DON, the ADON and RN Supervisor.

Evidence was presented that charge nurses hold STNA training sessions for nurse aides employed at the Employer’s facility. Weisberg testified that some of the charge nurses have “train-the-trainer” status and train STNAs at the Employer’s facility as well as other facilities operated by Multi Care Management. According to Hughley, the curriculum for the train-the-trainer programs for STNAs is developed by the Ohio Board of Health and is coordinated by Multi Care Management RN Shirley Craig.

Conflicting evidence was presented regarding job performance evaluations conducted by LPN/charge nurses upon STNAs and resident helpers. According to Bagwell, performance appraisals and job evaluations for nursing assistants are completed by the charge nurses, which are then reviewed by the RN supervisor. Both the charge nurse and the RN supervisor sign the performance evaluation before it is presented to the employee. With regard to evaluations, Weisberg testified that charge nurses “are the people working day to day with those nurse aides so we need their input as to whether or not those nurse aides are performing the functions that they’re suppose to delivering.” While Weisberg testified that the charge nurse’s role in the evaluation process may vary, charge nurses provide input into the evaluation by filling out the evaluation documentation and possibly telling the individual conducting the evaluation comments on the employee. With regard to the input provided by charge nurses, Weisberg testified that the charge nurses are the “grader” of nurses aides.

Hughley testified that he had personally been handed evaluation forms on some of the nursing assistants in his unit from Nursing Supervisor Teresa Seawright and was

instructed by Seawright to complete the evaluations. At hearing, performance evaluations conducted upon a restorative aide and an STNA were admitted into evidence. These evaluations were signed by an LPN, an RN and the evaluated employee. Hughley testified that the evaluation criteria are based on a point system and that the evaluation forms did not request the charge nurse to provide any recommendation upon whether a nurse aide or resident helper should be promoted or given a pay raise. According Hughley's testimony, charge nurses can "fill out the numbers on the sheet, but we cannot recommend any type of wage increase." In that vein, Hughley testified that he was never asked by RN Supervisor Seawright to provide an opinion as to any promotion or pay rate changes which should be awarded to any employee who worked within his unit. Moreover, no hearing evidence was provided demonstrating that evaluation points assessed by a charge nurse directly correlated to any promotion or rate of pay increase for an employee. Hughley testified that, "because there's no scale that says, 'This person gets this many points.' [The evaluation form] doesn't say in relation to how much raise [the employee is] going to get." Moreover, no evidence was presented showing that a charge nurse's evaluation directly and exclusively led to a positive or negative employment decision for any evaluated employee. The evaluations, at best, provide the evaluated employee direct feedback on strengths and weaknesses which the employee needs to correct.

The Employer contends that charge nurses recommend and issue disciplinary actions to STNAs and resident helpers in their unit. The Employer offered five completed Disciplinary Action forms into evidence for various disciplinary actions that

took place between December 11, 1997 through December 18, 1999.⁷ The submitted evidence of disciplinary actions is summarized in the following table:

Exhibit No.	Date of Disciplinary Action	Description of Misconduct	Disciplinary Action Issued	Managers' Signature[s] (By Job Title and Date)
C-11	February 25, 1998	Poor work performance; tardiness	Verbal Warning	LPN, February 25, 1998; RN, February 26, 1998
C-12	February 25, 1998	Poor work performance; tardiness	Verbal Warning	LPN, February 25, 1998; RN, February 25, 1998
C-13	December 15, 1997	Dishonesty	Written Warning	LPN, December 15, 1997; RN, December 15, 1997 ⁸
C-14	December 10, 1997	Resident neglect	Verbal Warning	LPN, December 10, 1997; LPN, December 9, 1997; RN, December 10, 1997
C-15	December 18, 1999	Resident abuse	Termination	LPN, December 18, 1999

Weisberg elaborated further into the disciplinary authority of charge nurses over STNAs. At hearing, Weisberg testified as follows with regarding the expected disciplinary authority of charge nurses:

⁷ Two further disciplinary actions were admitted into evidence that did not include an attached Disciplinary Action Form signed by an LPN.

Exhibit C-16 involved the termination of an STNA for sleeping on the job, failure to follow through on job responsibilities and prior employee misconduct. A termination report was signed by a human resources director on June 29, 1999. An attached Disciplinary Action Form was filled out and signed by RN Karen Long in which Long details a description of the misconduct. Attached to the Disciplinary Action Form are "Nurse's Notes" which detail the incidents of misconduct. These "Nurse's Notes" are unsigned but were written by an LPN/Charge Nurse. While the termination was for, *inter alia*, sleeping on the job, the attached Nurse's Notes taken by the charge nurse do not indicate any evidence of such misconduct.

Exhibit C-17 involved the termination of an STNA for verbal abuse towards a patient. The Disciplinary Action form was signed solely by an RN on March 15, 2000. Attached to the Disciplinary Action Form is an attached document signed by an LPN which details the incidents of misconduct. With respect to the Disciplinary Action Form, it appears that the RN recommended and issued termination for misconduct which was defined in the Union Handbook as a critical offense and cause for termination. Moreover, there appears to be no indication from this exhibit that an LPN recommended such action.

Charge nurses are the primary person responsible for the disciplinary action of nurses aides. ... In the event of resident abuse, if resident abuse is brought up, the charge nurse is to immediately remove the nurse aide from the unit and the building to safe keep the resident. That is both our policy and it is the Federal government's policy. So, they do act immediately upon something like that happening. They are required to remove charge nurse, I'm sorry nurse aides if, if they do something that violates policy. They are to do the disciplinary action. They are supposed to do the write up. They are supposed to direct whether or not that employee can stay in that facility. The only time that they would call a house supervisor is for clarification of a policy.

Weisberg further testified that charge nurses have recommended disciplinary actions, including the termination of STNAs, however, the Director of Nursing is usually involved in disciplinary actions where termination decisions are involved. Further, Weisberg was unaware of any situation where a charge nurses' recommendation for the issuance of discipline in the past five years has been overruled by a higher level supervisor.

With respect to his personal knowledge of disciplinary authority over nurse aides and resident helpers, Charge Nurse Hughley testified that the usual process in which a charge nurse notices or witnesses a problem involving a subordinate employee is to notify the RN supervisor as to the existence of the problem. Typically, the RN supervisor requests statements from the charge nurse detailing incidents of misconduct. While Hughley testified that he has not filled out a Disciplinary Action Form when submitting a statement describing an infraction of the Employer's policies by nurses' aides or resident helpers, he has, in one instance, been requested by a RN supervisor to prepare a statement describing such misconduct. Hughley testified that in this statement, he did not state his opinion or recommend the action to be taken against the STNA at issue. Moreover,

⁸ Although Exhibit C-13 does not indicate the job title for one of the individuals who signed off above the Manager's signature line, Bagwell testified that this disciplinary action was signed by

Hughley has not been informed by the Employer as to the disciplinary action which was issued as a result of his disciplinary report.

Evidence submitted at hearing indicated that charge nurses complete employee counseling forms for nursing assistants and resident helpers. The employee counseling forms “are the precursors to any disciplinary action that would be taking [sic] with the employee.” According to Bagwell, if an employee’s problem is not resolved or corrected after employee counseling, then a formal disciplinary action is issued. In fact, the face of the employee counseling form states that the form “is not a disciplinary measure and does not become part of the employee file unless the problem or concern cannot be resolved.”

Evidence at hearing also indicated that the charge nurses’ starting salary is at least double the salary or hourly wage rate paid to STNAs. In comparison to STNAs’ employee benefits, charge nurses receive larger amounts of vacation time, higher matching percentage for their 401(k) plan, as well as dental coverage and long term disability coverage. The charge nurses for each unit retain access to keys for certain security sensitive areas of the unit in which medical supplies and drugs are kept. Further the Employer maintains a uniform policy in which charge nurses are required to wear all white clothing. Hughley acknowledged that a uniform policy for LPNs exists at the facility. However, the uniform policy is not rigidly enforced.

Section 2(3) of the Act excludes from the definition of the “employee”, “any individual employed as a supervisor...” Section 2(11) of the Act sets forth the statutory definition of supervisor as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility

both an LPN and an RN.

to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

With respect to the above-definition, the Board analyzes the enumerated statutory indicia on a case-by-case basis to determine the supervisory status of employees. Providence Hospital, 320 NLRB 717 (1996), *enfd*, 121 F. 3d 548 (9th Cir. 1997). The Board requires that individuals asserted to be supervisors must be endowed with genuine managerial prerogatives. As such, both the Board and Courts refrain from construing supervisory status too broadly because the ramifications of an expansive construction would deny individuals from protections under the Act. *See, e.g., Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); Edward Street Daycare Center, Inc. v. NLRB, 189 F. 3d. 40 (1st Cir. 1999); NLRB v. Grancare, Inc., 170 F. 3d 662, 666 (7th Cir. 1999) (*en banc*); Williamson Piggly Wiggly v. NLRB, 827 F. 2d 1098, 1100 (6th Cir. 1987).

At the same time, the definition of supervisor in Section 2(11) is phrased in the disjunctive. Accordingly, the possession of any one indicia of supervisory status provides a sufficient basis for finding supervisory authority. *See, Ohio Power Co. v. NLRB*, 176 F. 2d 385, 387 (6th Cir. 1949), *cert. denied* 338 U.S. 899 (1949).

Based upon the Board's analysis of supervisory status, I find that the evidence in this case indicates that the LPN/Charge Nurses possess the authority to effectively recommend discipline to subordinate employees. Accordingly, I find the LPNs at issue in this matter are supervisors within the meaning of the Act and shall order the petition to be dismissed.

I find that the hearing evidence is uncontroverted with respect to the lack of authority that LPN/Charge Nurses effectuate with respect to the ability to transfer, lay off, recall or adjust grievances for STNAs and resident helpers

With respect to the assignment and direction of STNAs and other subordinate employees, I find the evidence reflects that LPN/charge nurses exercise limited discretion and give routine directions to employees consistent with the Employer's policies. In Beverly Enterprises-Pennsylvania, Inc. v. NLRB, 129 F. 3d 1269 (D.C. Cir. 1997), the court affirmed the Board's finding that LPNs exercise "extremely limited" direction and assignment to employees where the LPNs' assignment and direction of employees "consists of assigning and monitoring the performance of discrete patient care tasks, scheduling CNA breaks to minimize the disruption of patient care and sometimes assigning CNAs to particular patient rooms within a wing." Furthermore, in Beverly Enterprises v. NLRB, 148 F. 3d 1042, 1047 (8th Cir. 1998), the court affirmed the Board's finding that nurses' authority to adjust aides' duties and priorities in response to changes in patient condition and in personnel availability "does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies and protocol regarding patient care."

With respect to hiring employees, the evidence reflects that charge nurses have the opportunity to offer input upon prospective nursing candidates. Typically, charge nurses are involved in the first or second rounds of interviews and complete interview evaluation forms. These interview evaluation forms, are "taken into account when [the Employer] make[s] the decision whether or not to hire [sic] [a] prospective employee." While these forms establish that LPN/charge nurses participate in the hiring process for

prospective nursing candidates, the evaluation forms do not request LPN/charge nurses to make a recommendation on whether to hire an applicant. Accordingly, I find that charge nurses lack the level of authority with respect to hiring decisions necessary for Section 2(11) supervisory status.

With respect to the evaluation of employees, the evidence reflects that LPN/charge nurses are instructed by RN Supervisors to complete evaluation forms on behalf of STNAs and resident helpers working in their unit. Based upon the job performance evaluations submitted into evidence, the evaluation forms require the charge nurses to numerically rate employees based upon specified evaluation factors. The record evidence, however, is silent with respect to the weight given to charge nurses' evaluations or that such evaluations directly correlate with raises or promotions received by STNAs or resident helpers. In First Health Care Corp. d/b/a Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997), the Board found nurses to be supervisors within the meaning of the Act where their numerical evaluations of aides' performance determined the amount of the aides' wage increase. Conversely, in Ten Broeck Commons, 320 NLRB 806 (1996), the Board declined to find supervisory status where nurses perform evaluations that do not, by themselves, directly affect other employees' job status. In Health Care and Retirement Corp., 310 NLRB 1002, 1006-1007 (1993), the Board found that the authority to effectively recommend rewards is established where a supervisor's independent evaluation scores directly correlated with raises received by the employee. Additionally, in Vencor Hospital – Los Angeles, 328 NLRB No. 167, slip op. at p. 4 (August 5, 1999), the Board made no finding of supervisory status where the employer failed to establish how much weight is given to nurses' reports in preparing

employee evaluations and, in addition, “there is no evidence that their evaluations have any, let alone a direct, effect on employee wages.”

Accordingly, I find that evaluations conducted by LPN/Charge Nurses in this matter do not constitute effective recommendations to reward or promote employees to establish supervisory status.

As noted above, I find that the LPN/Charge Nurses have the requisite power to effectively recommend discipline and thus are supervisors within the meaning of the Act. This determination, however, is based in large measure upon Exhibit C-15, a Disciplinary Action Form dated December 18, 1999, for a termination decision issued to an STNA for patient abuse. With respect to Exhibit C-15, the evidence reflects that the STNA was terminated based upon an incident report recommending termination that was signed solely by a LPN/charge nurse. In its brief, the Petitioner attempted to diminish this exhibit, contending that “[t]he LPN was not responsible for the disciplinary action, which was ultimately made by the Director of Nursing.” The record, however, is a silent with respect to whether any other supervisor investigated this termination decision besides the LPN/charge nurse who recommended such action on the Disciplinary Action Form. While the Employer indicates that it is “good practice to bounce [the termination decision] off the house supervisor and to call that supervisor to discuss the issue,” it appears that no further investigation or review was conducted by a higher level supervisor prior to the charge nurse’s issuance of the termination recommendation.

Exhibit C-15 is the only clear example that indicates that an LPN/charge nurse possesses the authority to effectively recommend the discharge of employees. However, the Board, in Pepsi-Cola Company, 327 NLRB No. 183 (March 26, 1999) determined

that evidence of specified instances in which an account representative exercised the authority to discipline is sufficient to conclude that all account representatives possess the equivalent authority to discipline. In light of this Board decision, I find that all LPN/charge nurses in the instant matter possess the authority to effectively recommend the discharge of employees.

As noted above, Exhibits C-11 through C-14 reflect that LPN/charge nurses investigate and complete Disciplinary Action Forms. According to Bagwell's testimony, the RN Supervisor signs these forms in "an information capacity noting that they are aware that the action was taken or what transpired." Bagwell's testimony also indicates that the LPN/charge nurses complete the disciplinary action form and have the authority to recommend and issue discipline without further involvement by a higher level supervisor. Bagwell testified that charge nurses have recommended discipline upon the Disciplinary Action Form and that such discipline was imposed by the Employer.⁹

Additionally, Weisberg testified that in situations in which patient abuse claims are brought against nurses aides, the charge nurse has authority to immediately remove the nurse aide from the unit for violation of the Employer's policies. Weisberg also indicated that where charge nurses have recommended disciplinary action be taken against subordinate employees, he is unaware of any such recommendation that has been overturned by a higher level supervisor in the past five years.

In finding the LPN/charge nurses to be supervisors, I am aware that the Board has previously found a lack of supervisory authority where a charge nurse has issued

⁹ Based upon the testimony of Bagwell and Weisberg it appears that the LPN/charge nurse in each instance with the exception of C-13, recommended the disciplinary action issued. With regard to C-13, Bagwell testified that she did not know who recommended that a written warning be given to the employee in that instance.

discipline for flagrant violations of employer policies such as drunkenness or abuse of patients, without further review from a higher level supervisor. *See, G.H. Skipper, Inc.*, 254 NLRB 453, 454 (1981) (in a non-charge nurse setting, the Board stated that “the Board has long held that authority that is limited to taking action in response ‘to flagrant violations of common working conditions, such as being drunk, is insufficient by itself to establish supervisory status.”); *see also, Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 391, 393 (1989). In both of the latter cases, however, the charge nurses issued a suspension -- a much less severe disciplinary action than the termination imposed in the instant matter.

In *Phelps*, the employer’s handbook policy set forth a section for “automatic discharge offenses – requires immediate termination.” 297 NLRB at 487. In that case, the Board found that LPNs lacked supervisory status when they could suspend an employee for cursing at patients and the disciplinary response taken by LPNs are restricted by the handbook policies. Similarly, in *Waverly*, the Board found that LPNs lacked supervisory status where they had the authority to temporarily suspend employees for drunkenness or cursing. *Waverly, supra.*, 297 NLRB at 393. In that case, the Board found that the employer’s handbook defined conduct which the employer considered flagrant violations of its policies. The Board in *Waverly* noted that the LPNs lacked the authority to terminate employees for flagrant violations of the employer’s policy. *Id.* Further, the director of nursing had the authority to warn the employee that further violations would result in termination. *Id.*

I am, however, unaware of any case in which the Board has found that LPNs or charge nurses are employees where the evidence establishes they possess the authority to recommend discipline.

In the instant case, the record is silent with respect to the specific grounds for misconduct upon which charge nurses can issue disciplinary action against nurse aides or resident helpers. Thus, the record establishes that LPN/charge nurses possess the power to effectively recommend discipline and discharge of employees for misconduct without any independent investigation from higher level management and without limitation as to their independent judgment. The Board has recently found that such authority confers supervisory status. Heartland of Berkley, 328 NLRB No. 156 (1999).

Based on the foregoing, and the record as a whole, I find that the LPN/charge nurses at issue are supervisors within the meaning of the Act and shall order that the petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be hereby dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by May 4, 2000.

Dated at Cleveland, Ohio this 20th day of April 2000.

/s/ John Kollar

John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

524-0133-8700